80-5026

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No._____

LEON WASSERBERGER,

Petitioner,

v.

THE PEOPLE OF THE STATE
OF NEW YORK,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, LEON WASSERBERGER, who is presently at liberty pending a determination of his Petition for a Writ of Certiorari, asks leave to file the attached Petition for a Writ of Certiorari to the Court of Appeals of the State of New York without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 53.

The petitioner's affidavit in support of this motion is attached hereto.

IRVING ANOLIK, A Member of the
Bar of this Court

Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

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AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF BROWARD) ss.:

I, LEON WASSERBERGER, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the petitioner in the above-entitled case. 2. Because of my proverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

I was tried for a violation of 18 U.S.C. 1952 (Travel Act) in the United States District Court for the Southern District of New York, and was convicted. After being sentenced to 3 years imprisonment, I appealed to the United States Court of Appeals for the Second Circuit, which reversed the conviction and dismissed the indictment.

Thereafter, I was indicted by a grand jury in the State of New York for crimes based upon the identical facts as those presented in the federal prosecution. I pleaded double jeopardy and collateral estoppel, as well as prosecutorial misconduct, as a bar to a retrial. Nevertheless, the state courts

denied my plea in bar and I pleaded guilty, with the understanding that I could raise the same appeal points as those raised by petitioner Norman Archer, who was a co-defendant in the prosecution, as set forth in his petition, under No. , the substance of which I adopt. I am, however, annexing a single copy of a petition of my own since I was convicted and my conviction was affirmed under a separate judgment.

I am presently at liberty pending a determination of my Petition for Certiorari.

Leon Wasserberger

LEON WASSERBERGER

Duly witnessed and sworn to before me, a Notary Public, this 23 day of June, 1980.

Lois E. Mooney

Notary Public

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES NOV. 2 1982
BONDED THRU GENERAL INS. UNDERWRITERS

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In the
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LEON WASSERBERGER,

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THE PEOPLE OF THE STATE
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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

Petitioner, LEON WASSERBERGER, respectfully prays that this Court will grant a writ of certiorari to review an order of the Court of Appeals of the State of New York rendered the 24th day of April, 1980, which affirmed an order of the New York Supreme Court, Appellate Division, Second Department, which in turn had affirmed a judgment of the Supreme Court of the State of New York, County of New York, convicting the defendant-petitioner of the crimes of bribe receiving and receiving a reward for official misconduct, upon his plea of guilty before Sandler, J. (PEOPLE v. ARCHER, 68 A.D.2d 441, 417 N.Y.S.2d 507).

The petitioner was sentenced to 3 years imprisonment, but execution thereof has been stayed throughout the proceedings and at present, until this Court determines whether or not to grant certiorari.

OPINIONS BELOW

The Court of Appeals of the State of New York affirmed the Appellate Division of the Supreme Court of the State of New

York upon the opinion of the latter court. The decision and opinion of the Appellate Division is contained in the Appendix Opinions of petitioner NORMAN ARCHER, and are incorporated by reference herein. The order affirming the judgment of conviction in the New York Court of Appeals is annxed hereto.

The other opinions germane to this petition are MATTER OF KLEIN (WASSERBERGER) v. MURTAGH, 44 A.D.2d 465, aff'd., 34 N.Y.2d 988, and UNITED STATES v. ARCHER,486 F.2d 670 (2 Cir. 1973).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Court of Appeals of the State of New York affirmed the order of the Appellate Division, Second Department, on the 24th day of April, 1980.

QUESTIONS PRESENTED

1. Whether the case at bar presents sufficiently compelling circumstances warranting a bar to the prosecution of the petitioner herein because of police misconduct, irrespective of entrapment, in accordance with the reservations this Court made in the cases of UNITED STATES v. RUSSELL, 411 U.S. 423 and HAMPTON v. UNITED STATES, 425 U.S. 484?

2. Since the New York courts have sanctioned instigation of crimes by both federal and state agents as a means to investigate unknown and undiscovered criminality in a particular community of the state, should this conduct be condemned by this Court by removing the incentive for such actions in the future by vacating the conviction of petitioner (LEE v. FLORIDA, 392 U.S. 378, 20 L.Ed.2d 1166)?

(A) This raises the collateral issue of whether,under any circumstances, a federal agent should have been permitted to participate in such illegal activity and to have testified on

behalf of the prosecution as to the fruits of such unlawful conduct by the authorities (REA v. UNITED STATES, 350 U.S. 214, 100 L.Ed. 233)?

3. Whether the New York state trial of petitioner upon identical evidence used for the federal prosecution was barred under the doctrine of collateral estoppel within the purview of ASHE v. SWENSON, 397 U.S.436, 25 L.Ed.2d 469?

4. Whether the post-trial dismissal and reversal by the United States Court of Appeals of petitioner's federal indictment for violating 18 U.S.C. §1952, with intent to violate the New York bribery statutes (Travel Act), upon the grounds that there was insufficient evidence to have warranted the conviction, barred any further prosecution by the State of New York for bribery (PERRIN v. UNITED STATES, 100 S.Ct. 311; ASHE v. SWENSON, 397 U.S. 436, 25 L.Ed.2d 469)?

5. Whether petitioner's conviction shall be allowed to stand where, concededly, the prosecution had created the subject matter of the crime; supplied all of the ingredients for its commission, and, in the course of participating in this scheme committed the crimes of perjury in a state grand jury; submitting perjurious affidavits to be filed in the courts of record of the State of New York; suborning the commission of perjury in affidavits to be filed in court; committing the crime of offering false instruments for filing with a state public official; committing the crime of forgery; and conspiring to commit the foregoing offenses and to solicit, induce and aid and abet in their commission?

6. Whether the State of New York had the right to again try petitioner for crimes predicated upon the same facts and evidence for which he had been convicted in the United States District Court for the Southern District of New York, and upon

which facts the United States Court of Appeals for the Second Circuit reversed the conviction and dismissed the indictment because of insufficiency of evidence and prosecutorial misconduct (486 F.2d 670)?

7. Whether a person, such as Wasserberger, who has been tried and convicted in a federal court on a charge that he violated 18 U.S.C. §1952 by using the means of interstate commerce to facilitate the crime of "bribery in violation of... Section 200.00 and 200.10 of the Penal Law of the State of New York", and where such conviction is subsequently *reversed on* appeal by the United States Court of Appeals on the grounds that there was *insufficient evidence* of the use of the means of interstate commerce, can such a person thereafter constitutionally be tried in the State of New York for the same alleged bribery as that charged in the federal indictment? Does the subsequent state prosecution constitute a prosecution for a different "offense"? If so, and if Section 40.20(2)(f) of the Criminal Procedure Law permits such prosecution, is that statute valid and constitutional in view of a claim of double jeopardy and collateral estoppel?

8. Whether, in the circumstances of the preceding question, has the earlier federal prosecution been "terminated" by the appellate court order reversing the conviction, within the meaning of the Criminal Procedure Law statute in New York [Section 40.20(2)(f)]?

9. Whether an exploratory invasion of the criminal justice system of the County of Queens, State of New York, by federal and state officials who invent crimes to test that system, be encouraged and approved by permitting these officials to retain petitioner's conviction, which was engineered by this illegality?

10. Whether the determination by the United States Court of Appeals for the Second Circuit conclusively terminated the prosecution so that no further prosecution upon the same facts was permissible [486 F.2d 670 (2 Cir. 1973)]?

11. Whether petitioner was deprived of a speedy trial?

12. Whether this Court should order a dismissal of the charges and indictment herein as a matter of fundamental fairness and due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved herein, as are 18 U.S.C. §1952, Sections 200.00 and 200.10 of the Penal Law of the State of New York, and Section 40.20(2)(f), Criminal Procedure Law.

THE FACTUAL BACKGROUND

The factual background of this case is identical to that as presented in the Petition of a co-defendant of petitioner Wasserberger, namely Norman Archer, who has filed a Petition with this Court under No. 79- , October Term 1979.

We incorporate by reference the factual allegations therein, except we ask this Court to note that, unlike petitioner Archer, petitioner Wasserberger only went to trial in the United States District Court for the Southern District of New York and pleaded guilty in the Supreme Court of the State of New York, with the specific understanding that he could preserve the same appellate points as petitioner Archer.

We also adopt and incorporate by reference that portion of petitioner Archer's Petition for Certiorari under the topic "REASONS FOR GRANTING THE WRIT".

The Appendix Opinions of petitioner Archer are also incorporated by reference herein, but we have annexed the order affirming the judgment of conviction of petitioner Wasserberger in the New York Court of Appeals.

CONCLUSION

The petition for certiorari should be granted and the judgment of conviction of petitioner Wasserberger should be vacated.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

ORDER OF AFFIRMANCE OF NEW YORK COURT OF APPEALS

COURT OF APPEALS
STATE OF NEW YORK

2 No. 232

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

LEON WASSERBERGER,

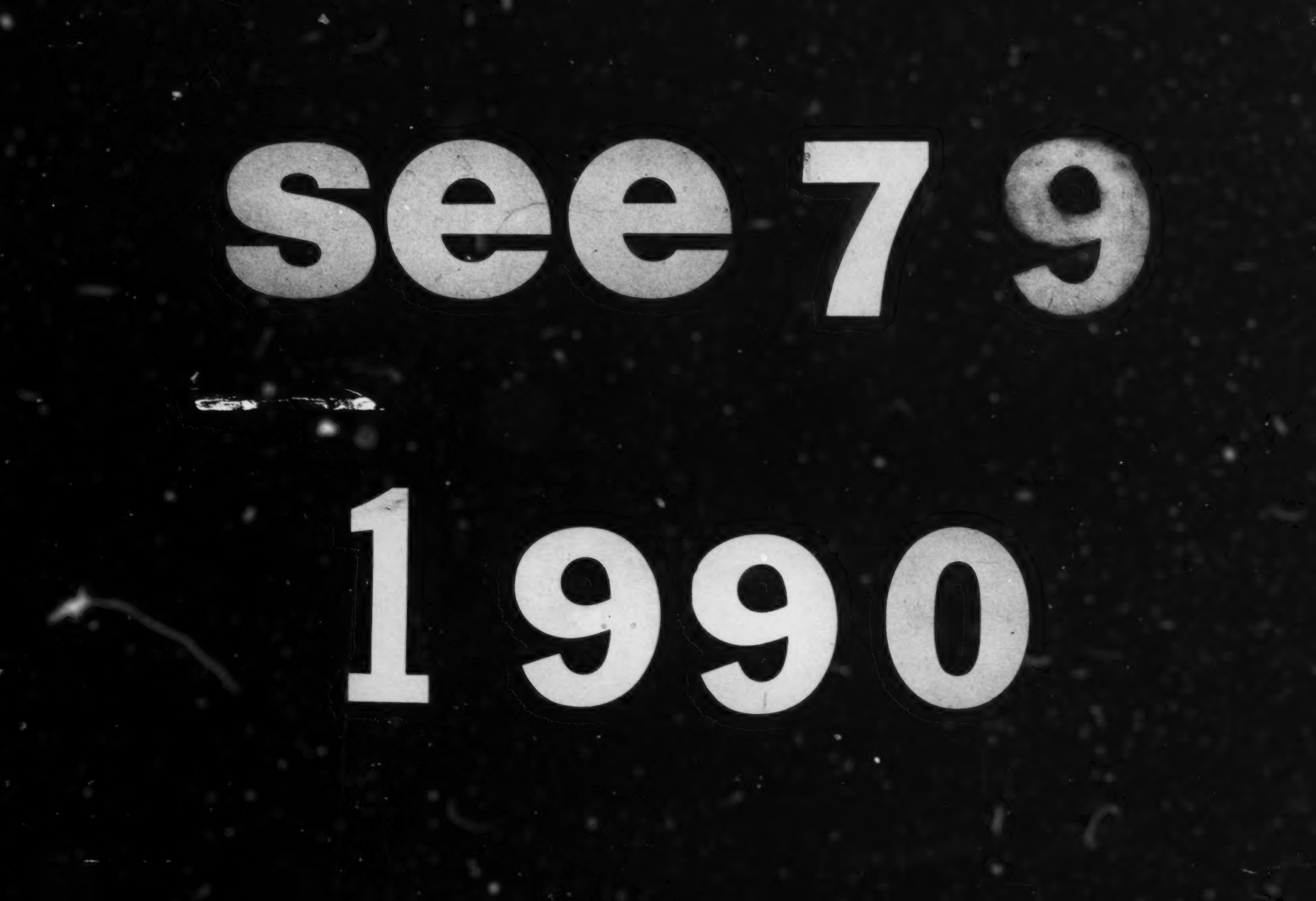
Appellant.

Order affirmed (see People v. Archer, ___N.Y.2d___, decided herewith).

All concur.

Dated: April 24, 1980.

s/
Clerk of the Court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